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JAN - 7 2008

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIAPOSTED ON WEBSITE
NOT FOR PUBLICATIONUNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)	Case No. 04-28375-D-13L
)	Docket Control No. FWP-1
KEVIN HEALY,)	
)	
)	
Debtor.)	

MEMORANDUM DECISION

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

On April 28, 2005, the chapter 13 trustee in this case, Lawrence J. Loheit ("the Trustee") filed his Final Report and Account ("the Report"). On May 31, 2005, the debtor, Kevin M. Healy ("Healy"), filed his Notice of Objection to Disbursement of Attorneys Fees; Request for Hearing (the "Objection"), in which he objected to the Report "to the extent that it allows any fees to attorney Peter G. Macaluso, Esq." Following briefing and oral argument, the court approved the Report, and Healy appealed. On August 22, 2006, the Ninth Circuit Bankruptcy Appellate Panel vacated the order approving the Report and remanded the matter for further findings consistent with its decision. The parties have now further briefed and argued the issues, and the court has conducted an evidentiary hearing at which Healy and Peter G. Macaluso ("Macaluso") testified.

/ / /

1 For the reasons set forth below, the court will sustain the
2 Objection, and order that Macaluso return to Healy the full
3 amount of attorney's fees he received for his services in this
4 case, \$1,210. Healy's specific challenge to the Report was to
5 the payment by the Trustee to Macaluso of \$710 as attorney's
6 fees. However, prior to the commencement of the case, Healy had
7 paid Macaluso \$500 as a retainer. Based on the comments of the
8 Bankruptcy Appellate Panel in its decision remanding the matter
9 (see page 6 below), the court concludes that the \$500 payment
10 should stand or fall with the Trustee's \$710 payment.¹

11 I. INTRODUCTION

12 Healy is an attorney at law, so licensed in California and
13 Washington, practicing in the areas of military law, aviation
14 matters, "civil law," family law, and personal injury, according
15 to his website, www.healy-law.com.

16 On August 16, 2004, Healy, then represented by Macaluso,
17 filed a voluntary petition for relief under chapter 13 of the
18 Bankruptcy Code, thereby commencing this case.² On January 5,
19 2005, the court granted the Trustee's motion to dismiss the case
20 on the ground that Healy's unsecured debt exceeded the limit for
21 chapter 13 eligibility fixed by 11 U.S.C. § 109(e), \$307,675.

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23
24 1. Macaluso acknowledged in his response filed May 4, 2007, at
25 1:20-21, that the amount at issue in this matter is \$1,210.

26 2. Unless otherwise indicated, all Code, chapter, section and
27 Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
28 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
enacted and promulgated prior to the effective date (October 17,
2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act
of 2005, Pub. L. 109-8, 119 Stat. 23 (2005).

1 Healy then challenged the Trustee's Report, and in
2 particular, the Trustee's payment of \$710 to Macaluso as
3 attorney's fees incurred in the case. The court approved the
4 Report over Healy's objection, but the order was vacated on
5 appeal.

6 Following remand, Macaluso filed a motion to set the matter
7 for further proceedings, pursuant to Local Bankruptcy Rule 8020-
8 1. The court took Macaluso's motion as a motion for approval of
9 attorney's fees, as required by paragraph 3 of the court's
10 Guidelines for Payment of Attorneys' Fees in Chapter 13 Cases
11 (Effective July 1, 2003). On February 9, 2007, the court issued
12 an order fixing deadlines for the filing of supplemental briefs
13 and evidence.

14 On February 20, 2007, Healy filed a motion to extend the
15 briefing schedule. The court granted Healy's motion, and on
16 February 27, issued an amended order, extending by six weeks each
17 the deadlines for Healy and Macaluso to file their briefs and
18 evidence.

19 Healy filed no further motion to extend the briefing
20 schedule or to modify the amended scheduling order. Then, on
21 April 23, 2007, the first business day after his deadline had
22 passed, Healy filed a "Preliminary Notice of Objections and
23 Further Evidence for Opposition to Attorney Fees on Issues on
24 Remand," in which he complained that a lack of cooperation on the
25 part of Macaluso and his counsel, together with Healy's military
26 duties and family health issues, had prevented him from
27 conducting the discovery he needed. On May 5, 2007, after the
28 deadline for Macaluso to file his brief and evidence had passed,

1 and the evidentiary record thus had closed, Healy served on
2 Macaluso a subpoena for his deposition and for the production of
3 documents.

4 Macaluso responded with a motion to quash the subpoena and
5 for an award of costs in the amount of \$1,380, increased to
6 \$2,640 by the time Macaluso's reply was filed. Following
7 briefing and a hearing, the court quashed the subpoena and
8 continued the hearing as to Macaluso's request for an award of
9 costs to August 23, 2007.³ The court continued the hearing on
10 the Objection to the same date and time. On August 22, the day
11 before the hearing, Healy submitted a request for a further
12 continuance, which the court granted, continuing both hearings to
13 September 26. On September 24, Healy filed a motion for another
14 continuance, which the court granted, continuing the hearings to
15 November 14.

16 On November 14, 2007, having determined that the
17 declarations of Macaluso and Healy thus far submitted were
18 factually at odds with one another, the court set an evidentiary
19 hearing for December 10, 2007, for the limited purpose of taking
20 testimony as to what advice Macaluso had given Healy before the
21 filing of the petition commencing this case, and in particular,
22 as to what Macaluso had told Healy about the requirements for
23 chapter 13 eligibility, the effect of the automatic stay on
24 pending state court proceedings, and the ability to have certain
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26 _____
27 3. The court's findings and conclusions supporting the decision
28 to quash the subpoena were read into the record at a June 12, 2007
hearing.

1 state court claims determined in adversary proceedings in the
2 bankruptcy court.

3 The court required Healy and Macaluso to file direct
4 testimony declarations and exhibits in accordance with Local
5 Bankruptcy Rule 9017-1. Both submitted declarations, Healy
6 submitted exhibits, and an evidentiary hearing was held on
7 December 10, 2007, at which Healy and Macaluso testified and were
8 cross-examined. The court was not impressed with the candor or
9 credibility of either party. Macaluso had clear recall at times,
10 when it was self-serving, and at other times, his recall was
11 poor. However, as between the two, the court found Healy to be
12 the less credible and less forthcoming. In particular, the court
13 found Healy to be very evasive, unresponsive, coy, and
14 contentious in his testimony.

15 Healy challenges the attorney's fees paid to Macaluso on
16 several grounds, among them that Macaluso had improperly
17 counseled Healy that he qualified for chapter 13 relief when he
18 did not.⁴ Macaluso responds that Healy may in fact have
19 qualified for chapter 13 relief. Macaluso also contends that
20 even if Healy did not qualify, the petition was filed on an
21 emergency basis, Healy understood the requirements for and
22 ramifications of a chapter 13 filing, and on that basis, made the
23 decision to proceed with the filing, the failure of the chapter
24 13 case was Healy's fault, and the work Macaluso performed in the
25 case was worth the amount of fees he received and then some.

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27 4. Because the court's decision concerning Macaluso's handling
28 of the eligibility issue is dispositive of the Objection, there is no
need to consider the other issues raised by Healy.

A bankruptcy court awards attorney's fees for services rendered in a bankruptcy case pursuant to § 330(a). The allowance of fees and costs to a chapter 13 debtor's attorney is "based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section." § 330(a)(4)(B). The court must consider, among other things, "whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title" § 330(a)(3)(C).

Smith v. Edwards & Hale (In re Smith), 317 F.3d 918, 926 (9th Cir. 2002).

Macaluso has the burden of proof as to his entitlement to attorney's fees. Law Offices of David A. Boone v. Derham-Burk (In re Eliapo), 298 B.R. 392, 402 (9th Cir. BAP 2003); Hale v. United States Trustee (In re Basham), 208 B.R. 926, 931-32 (9th Cir. BAP 1997).

On Healy's appeal in this matter, the Bankruptcy Appellate Panel determined that "if it turns out that Macaluso negligently counseled [Healy] to file a bankruptcy case for which he was clearly ineligible, all of the fees incurred in connection with the ill-advised chapter 13 case might be rendered unreasonable under § 330(a)." Healy v. Macaluso (In re Healy), BAP No. EC-05-

1 1396-SBMo, Memorandum filed August 22, 2006, at 13. The court
2 will therefore examine, first, whether Healy was ineligible for
3 chapter 13 relief when this case was commenced, and if so,
4 whether Macaluso improperly counseled him to file anyway, or
5 alternatively, failed to sufficiently inform Healy of the
6 eligibility issue.

7 If these questions are answered in the affirmative, the
8 court may order the disgorgement of all fees received by Macaluso
9 in connection the case. § 329(b); Rule 2017(a) and (b).

10 A. Whether Healy qualified for chapter 13 relief

11 At the time Healy's petition was filed, only an individual
12 who owed noncontingent, liquidated, unsecured debts of less than
13 \$307,675 and noncontingent, liquidated, secured debts of less
14 than \$922,975 was eligible for chapter 13 relief. § 109(e).⁵
15 Whether a debtor is eligible under these tests "should normally
16 be determined by the debtor's originally filed schedules,
17 checking only to see if the schedules were made in good faith."
18 Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 982 (9th Cir.
19 2001).

20 Thus, the court looks to Healy's originally filed schedules.
21 Healy's F-schedule, filed with his petition on August 16, 2004,
22 showed \$264,128.82 in noncontingent, liquidated, unsecured debts.
23 His D-schedule showed \$271,721.67 in noncontingent, liquidated
24 secured debts, of which \$72,683 was the total of the unsecured
25 portions of two debts owed to Healy's mother, Teryl Dayton Healy.
26 Thus, the original schedules showed a total of \$336,811.82 in

27 5. Pursuant to § 104(b), these figures are adjusted every three
28 years.

1 noncontingent, liquidated, unsecured debts,⁶ more than the
 2 \$307,675 limit under § 109(e). On their face, then, Healy's
 3 originally filed schedules indicated Healy was not eligible for
 4 chapter 13 relief.

5 Macaluso argues that he "[does] not believe that the debt
 6 limits of section 109 were exceeded, as the potential debts to
 7 the anti-SLAPP creditors were contingent and/or unliquidated, as
 8 reflected in the amended schedules filed in this case."

9 Alternate Direct Testimony of Peter G. Macaluso ("Macaluso ADT"),
 10 ¶ 11.

11 The "anti-SLAPP creditors" to whom Macaluso refers are
 12 Charles E. Bauer and Cynthia Rose. In separate Sacramento County
 13 Superior Court actions, the court had granted Bauer's and Rose's
 14 special motions to strike Healy's complaints against them, under
 15 California Code of Civil Procedure § 425.16, each as a
 16 "strategic lawsuit against public participation," known as an
 17 anti-SLAPP motion. Bauer and Rose then filed motions for awards
 18 of attorney's fees and costs against Healy, Bauer in the amount
 19 of \$39,055 and Rose in the amount of \$6,703.80.

20 On October 12, 2004, five days after the meeting of
 21 creditors in the bankruptcy case, Healy filed an amended F-
 22 schedule, in which he characterized the debt to Bauer as
 23 unliquidated, whereas it had been listed as liquidated in the

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 28 6. Undersecured portions of secured debts count as unsecured
 for the § 109(e) eligibility test. Scovis, 249 F.3d at 983.

1 original schedule.⁷ He also added a new creditor, Rose,⁸ out of
2 an "abundance of caution," at \$1.00, also unliquidated.⁹ By way
3 of the amended schedule, then, Healy attempted to take these
4 debts out of the calculation, thereby bringing his unsecured debt
5 total below the limit for eligibility purposes, \$307,675.¹⁰

6 Macaluso contends that this amendment rendered Healy
7 eligible for chapter 13. By contrast, under Scovis, absent a
8 challenge to a debtor's good faith in filing the schedules, the
9 court should look to the originally filed schedules. Although
10 there were two objections to the confirmation of Healy's chapter
11 13 plan, one by the Trustee and one by Bauer, neither suggested
12 that the original schedules were not filed in good faith. Thus,
13 the court finds those schedules to be dispositive of the issue.

14 However, even if the amended schedules were to be
15 considered, the outcome would be the same, because the court
16 finds the Bauer and Rose debts to be liquidated and noncontingent
17 for purposes of the § 109(e) test. In the Ninth Circuit, "a debt
18 is liquidated for the purposes of calculating eligibility for
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20
21 7. The debt was listed in the amended schedule as a debt to the
law firm of Murphy, Pearson, Bradley & Feeney, Bauer's attorneys.

22 8. The debt to Rose was listed as a debt to the Law Office of
23 Stephanie J. Finelli, Rose's attorney.

24 9. Healy also listed these debts, and a third, as disputed as
well as unliquidated. The characterization of the debts as disputed
25 does not help Healy, however, if the debts were liquidated and
noncontingent. See Slack v. Wilshire Ins. Co. (In re Slack), 187
26 F.3d 1070, 1073-75 (9th Cir. 1999); and see discussion below.

27 10. Healy also changed the characterization of a third debt, to
Thompson [Thomson] West Publishing, \$10,341.70, to unliquidated. The
28 net effect of the amendment was to reduce to \$286,470.12 the total of
the noncontingent, liquidated, unsecured debts.

1 relief under § 109(e) if the amount of the debt is readily
2 determinable." Slack v. Wilshire Ins. Co. (In re Slack), 187
3 F.3d 1070, 1073 (9th Cir. 1999).

4 Whether a debt is readily determinable, in turn, depends on
5 "whether the amount is easily calculable or whether an extensive
6 hearing will be needed to determine the amount of the debt, or
7 the liability of the debtor." Id. at 1074. "The definition of
8 'ready determination' turns on the distinction between a simple
9 hearing to determine the amount of a certain debt, and an
10 extensive and contested evidentiary hearing in which substantial
11 evidence may be necessary to establish amounts or liability." In
12 re Wenberg, 94 B.R. 631, 634 (9th Cir. BAP 1988).

13 "[T]he mere assertion by the debtor that he is not liable
14 for the claim will not render the debt unliquidated for the
15 purposes of calculating eligibility under § 109(e)." Slack, 187
16 F.3d at 1074. In short, in the Ninth Circuit, "a debt is
17 liquidated if the amount is readily ascertainable,
18 notwithstanding the fact that the question of liability has not
19 been finally decided." Ibid.

20 The Bauer and Rose debts were on account of attorney's fees
21 and costs incurred by them in connection with their anti-SLAPP
22 motions. Attorney's fee claims are determined by both state
23 courts and bankruptcy courts on a regular basis. In the Wenberg
24 case, supra, the bankruptcy court, in a "not overly extensive"
25 hearing, was able to determine the amount of attorney's fees and
26 costs incurred in underlying litigation, and on that basis, the
27 Ninth Circuit Bankruptcy Appellate Panel affirmed the court's
28 conclusion that the claim for fees was "subject to ready

1 determination." 94 B.R. at 635. The Court of Appeals affirmed.
2 In re Wenberg, 902 F.2d 768 (9th Cir. 1990). Similarly, this
3 court concludes that determination of the amounts of the Bauer
4 and Rose debts would be relatively simple, and thus, that the
5 debts were readily ascertainable, and therefore liquidated.

6 The debts were also noncontingent. "[A] debt is
7 noncontingent if all events giving rise to liability occurred
8 prior to the filing of the bankruptcy petition." Nicholes v.
9 Johnny Appleseed (In re Nicholes), 184 B.R. 82, 88 (9th Cir. BAP
10 1995). By contrast, "[a] contingent debt is 'one which the
11 debtor will be called upon to pay only upon the occurrence or
12 happening of an extrinsic event which will trigger the liability
13 of the debtor to the alleged creditor.'" Id. quoting In re
14 Fostvedt, 823 F.2d 305, 306 (9th Cir. 1987). "[T]he fact that a
15 claim has not been reduced to judgment does not render it
16 contingent." Id. citing In re Dill, 30 B.R. 546, 549 (9th Cir.
17 BAP 1983).

18 In this instance, the anti-SLAPP motions had been filed and
19 determined, and Bauer's and Rose's attorney's fees and costs for
20 those motions had been incurred prior to the filing of Healy's
21 bankruptcy petition. There remained no other event necessary to
22 trigger liability on Healy's part. The fact that one or both fee
23 motions had not yet been ruled on by the state court is
24 irrelevant (Nicholes, 184 B.R. at 88), as is the fact that Healy
25 disputed the claims. "[E]ven a bona fide dispute over liability
26 for a claim does not make the debt contingent." Id. at 89.

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1 The Bauer and Rose debts were therefore liquidated and
2 noncontingent, and were appropriately included in the § 109(e)
3 calculation, regardless of the fact that Healy disputed them.

4 Adding these two debts, \$6,703.80 to Rose and \$39,055 to
5 Bauer, to the \$286,470.12 remaining after the filing of the
6 amended F-schedule brings the total of Healy's noncontingent,
7 liquidated, unsecured debt to \$332,228.92. Thus, Healy exceeded
8 the § 109(e) limit unless Healy's debts to his mother somehow
9 changed the equation.

10 It appears Macaluso recognized the possibility that the
11 bifurcation of Healy's mother's claims might alter the outcome.
12 The correspondence between Healy and Macaluso after the
13 objections to confirmation had been filed suggests that Macaluso
14 at least attempted to obtain additional information from Healy
15 that might support the theory that the undersecured portions of
16 his mother's claims might actually be less than originally
17 scheduled. However, no further evidence to support this theory
18 was ever submitted, so the court is left with the conclusion that
19 the total of Healy's noncontingent, liquidated, unsecured debt in
20 fact rendered him ineligible for chapter 13 relief, whether one
21 considers only the original schedules or the amended F-schedule.¹¹

22 B. Whether Macaluso properly advised Healy

23 Having rejected Macaluso's argument that Healy was in fact
24 eligible to be a chapter 13 debtor, the court must consider
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26 11. The court does not mean to suggest that an amendment to the
27 D- and F-schedules might have salvaged the case. As the court has
28 already concluded, under Scovis, as the original schedules were
apparently filed in good faith, they were determinative of the
eligibility issue.

1 whether Macaluso advised Healy in this regard. Macaluso's
2 testimony is that he "does not recall that any issues arose or
3 what we discussed regarding the debt limits," and that up until
4 the time of their in-person meeting the evening the petition was
5 filed, "no issues arose which gave a reason to discuss the debt
6 limits of chapter 13, and the debt limits were not specifically
7 discussed." Macaluso ADT, ¶¶ 9, 50. There is no evidence that
8 the issue was discussed at all prior to the filing of the
9 petition.

10 Macaluso testified that several other issues were
11 extensively discussed, including the liquidation analysis,
12 feasibility, disposable income, preferences, insider
13 transactions, the automatic stay, and the possibility of
14 conversion, dismissal, and/or refiling. However, there is no
15 evidence that the § 109(e) debt limits were discussed. Thus,
16 Macaluso has not submitted evidence that his advice to Healy was
17 sufficient to reasonably apprise Healy that his case might face
18 dismissal because of the debt limits, so that Healy could make an
19 informed decision whether to proceed. Macaluso contends that
20 Healy caused the petition to be filed "knowingly, voluntarily and
21 intelligently." Regardless, debtor's counsel has a duty to
22 assess eligibility before a chapter 13 is filed, and to advise
23 the client if there are eligibility issues. There is no evidence
24 that this was done.

25 The court recognizes that Healy gave Macaluso a relatively
26 short period of time in which to prepare for the bankruptcy

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1 filing, a period of between one and two weeks.¹² The court
2 acknowledges Healy's apparent determination to use a bankruptcy
3 filing to avoid a state court filing deadline he perceived as
4 unfair and in violation of federal law. The court also
5 recognizes that, in pushing to file the bankruptcy petition
6 before that deadline, Healy may have pressured Macaluso to file
7 without the detailed financial information and documentation
8 Macaluso would have preferred to have.

9 Nevertheless, the debt limits are a fundamental test of a
10 debtor's eligibility for chapter 13 relief, and therefore, should
11 be addressed prior to any chapter 13 filing. Macaluso should
12 have addressed the issue specifically with Healy, and should have
13 cautioned him that the case stood to be dismissed if Healy in
14 fact exceeded the debt limits. There is no evidence that
15 Macaluso took these steps.

16 Macaluso testified he believes Healy would have filed the
17 petition even if he had known he faced a challenge based on the
18 debt limits. Macaluso points to Healy's filing in one of the
19 state court actions of a Notice of Stay Due to Bankruptcy Filing
20 even before the bankruptcy petition was filed and before Macaluso
21 and Healy had their in-person meeting. Macaluso concludes that
22 Healy "had made the decision to file his bankruptcy prior to
23 meeting with [Macaluso] that day." Macaluso ADT, at ¶ 60.

24
25 12. The court gives no credit to Healy's argument that Macaluso
26 had known of Healy's interest in a bankruptcy filing for about a
27 year. As an attorney himself, Healy is undoubtedly aware that
28 prospective clients often do not return after an initial
consultation. Macaluso cannot have been expected to concern himself
with Healy's financial situation before Healy contacted him on or
about August 7, 2004.

1 . It may be that Healy had already made up his mind to proceed
2 with the chapter 13 filing. It is also possible he would have
3 proceeded even if he had known of the potential § 109(e)
4 challenge, based on the need to beat the state court filing
5 deadline.¹³ The court need not reach this issue, however, because
6 the key question is whether Macaluso provided Healy with
7 sufficient information regarding the eligibility issue to make an
8 informed decision. The court concludes that he did not.

9 Macaluso also testifies that he recommended Healy
10 "thoroughly research the law in this field [bankruptcy]," and
11 that he asked Healy "to review the Bankruptcy Code." Macaluso
12 ADT, at ¶¶ 16, 19. At the time of the bankruptcy filing,
13 Macaluso assumed Healy had "complied with [his] request to review
14 bankruptcy law from the time [they] originally spoke a year
15 before," and based on that assumption, he believed Healy "knew
16 what he was doing knowingly, voluntarily, and intelligently."
17 Id. at ¶ 29.

18 First, the fact that a client is himself an attorney in no
19 way excuses or lessens an attorney's duties to the client.
20 Further, the complexity of bankruptcy law is such that, even with
21 a year to conduct research, it is not reasonable to expect a non-
22 bankruptcy attorney to be fully versed on the requirements for
23 and ramifications of a chapter 13 filing. More important, the
24 analysis of applicable bankruptcy law is the duty of the debtor's
25

26 13. The court notes that a debtor's ineligibility under §
27 109(e) is not jurisdictional (Wenberg, 94 B.R. at 637), and thus,
28 this case might have proceeded despite Healy's ineligibility if the
Trustee and creditors had not objected. Thus, the court rejects
Healy's repeated characterization of the chapter 13 filing as
"illegal."

1 counsel, not the debtor. Both the disclosure required by Rule
2 2016(b) and this court's Rights and Responsibilities of Chapter
3 13 Debtors and Their Attorneys recognize debtor's counsel's duty
4 to assess the debtor's financial situation.¹⁴ In short, it is no
5 excuse that Healy should have discovered the § 109(e) issue on
6 his own.

7 Macaluso's attempt to shift the blame to his bankruptcy
8 filing software is flawed for similar reasons. A computer
9 program that "red-flags" cases with debts exceeding the § 109(e)
10 limits may be a useful tool; it cannot replace the attorney's
11 duties to his or her client.

12 Finally, Macaluso points to his and Healy's respective
13 military backgrounds, that Healy was "an Active Naval JAG
14 Officer," whereas Macaluso was "an enlisted marine." "I do not
15 question officers' decisions, especially a Naval JAG Officer and
16 seasoned litigator with regard to military justice." Macaluso
17 ADT, ¶ 13. Obviously, the parties' roles in this proceeding were
18 not as military personnel, but as attorney and client. This
19 testimony, therefore, does not excuse Macaluso's failure to
20 properly advise his client.

21 It is clear Macaluso felt pressured to file a chapter 13 for
22 Healy, and Healy did certain things that made him uncomfortable.

23
24 14. The Rule 2016(b) disclosure acknowledges that in return for
25 his or her fee, the debtor's counsel agrees to provide "an analysis
26 of the debtor's financial situation, and . . . advice to the debtor
27 in determining whether to file a petition in bankruptcy" The
28 Rights and Responsibilities acknowledges that debtor's counsel is to
"meet with the debtor to review the debtor's debts, assets,
liabilities, income, and expenses," and to "counsel the debtor
regarding the advisability of filing either a Chapter 7 or Chapter 13
case, discuss both procedures with the debtor, and answer the
debtor's questions." Both these documents were filed in this case.

1 However, Macaluso's response should have been to decline
2 representation. Once Macaluso accepted representation, he was
3 duty bound to provide services at the requisite level of care and
4 competency.

5 In short, an attorney preparing to file a chapter 13
6 petition for a client must explore the issue of the debt limits,
7 explaining the ramifications and possible means to overcome such
8 a challenge, if any, and then, to the extent a filing would not
9 violate applicable ethical rules, allow the client to make the
10 decision whether to proceed. That did not happen here.

11 It was clear from the schedules filed with the chapter 13
12 petition that Healy was not eligible for chapter 13 relief, and
13 the case was dismissed for this reason. As a result, the court
14 finds Macaluso's services were not necessary to the
15 administration of the case, nor were Macaluso's services
16 beneficial at the time at which the services were rendered toward
17 a completion of the case. The court concludes that Macaluso has
18 not met his burden of proving his entitlement to attorney's fees
19 for his services performed in and in contemplation of this case.

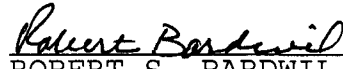
20 III. CONCLUSION

21 The court therefore concludes that, although the services
22 performed by Macaluso may have been worth well over \$1,210 when
23 considered in a vacuum, as eligibility was not discussed, and the
24 case was ultimately dismissed based on Healy's ineligibility,
25 such services were not necessary and beneficial to Healy as the
26 debtor in the case. The court notes that services may be
27 compensable if they were reasonably likely to be necessary and
28 beneficial when rendered, even if the case turns out to be

1 unsuccessful. Smith, 317 F.3d at 926. Thus, had Macaluso fully
2 explored the § 109(e) issues with Healy prior to the filing, and
3 had Healy made the decision to proceed anyway, the court would
4 likely find Macaluso entitled to compensation notwithstanding
5 that the case was dismissed on § 109(e) grounds. Because
6 Macaluso did not take this step, however, he is not entitled to
7 compensation, and the court will direct him to return to Healy
8 the \$1,210 he received as compensation for the case.

9 The court will issue an order consistent with this
10 memorandum.

11 Dated: January 8, 2008


12 ROBERT S. BARDWIL
13 United States Bankruptcy Judge
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CERTIFICATE OF MAILING

I, Andrea Lovgren, in the performance of my duties as Deputy Clerk to the Honorable Robert S. Bardwil, mailed by ordinary mail a true copy of the attached document on today's date to each of the parties listed below:

Office of the US Trustee
501 "I" Street, 7th Floor
Sacramento, CA 95814


Lawrence Loheit
P.O. Box 1858
Sacramento, CA 95812-1852

Kevin Healy
1405 G Street
Sacramento, CA 95814

Peter Macaluso
910 Florin Road, #111
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Felderstein Fitzgerald Willoughby & Pascuzzi
400 Capitol Mall, Suite 1450
Sacramento, CA 95814

DATE: JAN - 7 2008



Deputy Clerk